UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ORCHIDS PAPER PRODUCTS CO., and UNITED STEEL, PAPER & FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO,	Cases 14-CA-184805 14-CA-184807 14-CA-188413 14-CA-189031 14-CA-190022 14-CA-192908 14-CA-199035

POST-HEARING BRIEF ON BEHALF OF RESPONDENT ORCHIDS PAPER PRODUCTS CO.

Steven A. Broussard
Molly Aspan
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.
320 South Boston Avenue, Suite 200
Tulsa, Oklahoma 74103-3706
Telephone: (918) 594-0595
Facsimile: (918) 594-0505
maspan@hallestill.com

ATTORNEYS FOR RESPONDENT ORCHIDS PAPER PRODUCTS CO.

TABLE OF CONTENTS

Page

INTRODUCTION 1

SUMMARY OF CLAIMS 1

SUMMARY OF RELEVANT EVIDENCE AND FINDINGS OF FACT 2

I. The Parties 2

II. Relevant Portions of the CBA between Orchids and the Union 3

III. People Source Employees 5

A. Background 5

B. Communications between Orchids and the Union 7

C. Named People Source Employees 11

IV. Conversion of Lines 6 and 7 12

V. Changes to Health Insurance Plan 14

VI. Changes to Clothing, Shoe and FRC Policies 14

A. OSHA Investigation and Clothing and Shoe Policies 14

B. Arc Flash Compliance with NFPA 70E and FRC Policy 17

VII. Discipline of Michael Besley 19

VIII. Other Section 8(a)(1) Alleged Violations 22

AUTHORITIES AND CONCLUSIONS OF LAW APPLIED TO FACTS 24

I. Legal Standard for Section 8(a)(1) Claims 25

II. Legal Standard for Section 8(a)(3) Claims 25

III. Legal Standard for Section 8(a)(5) Claims 29

IV. Claims Regarding People Source Employees 31

A. Orchids and People Source Were Not Joint Employers of People Source Employees within the Meaning of *Browning-Ferris Industries* 32

B. Because People Source Employees Were Not Employees of Orchids, They Are Not Covered Under the Act 34

C. Because the People Source Employees Were Not Employees of Orchids, They Are Not Covered Under the CBA between Orchids and the Union 36

TABLE OF CONTENTS
(continued)

Page

D. The General Counsel Is Unable to Establish a *Prima Facie* Case of Section 8(a)(3) Discrimination Based on Orchids' Decision Not to Use People Source Employees as Temporary Workers 37

E. Neither the Use of People Source Employees nor the Failure to Use People Source Employees Affected Members of Orchids' Bargaining Unit 38

V. Claims Regarding Conversion of Lines 6 And 7 41

VI. Claims Regarding Changes To Health Insurance Plan 41

VII. Claims Regarding Changes to Clothing, Shoe and FRC Policies 43

A. OSHA Investigation and Clothing and Shoe Policies 43

B. Arc Flash Compliance with NFPA 70E And FRC Policy 45

VIII. Claims Regarding Discipline of Michael Besley 46

IX. Claims Regarding Union Activities During Working Time 48

X. Claims Regarding Other Section 8(a)(1) Alleged Violations 49

PROPOSED CONCLUSIONS OF LAW REMEDY AND NOTICE 50

TABLE OF AUTHORITIES

Page

Affiliated Hosp. Prods., 245 NLRB 703 (1979) 28
Allied Chem. & Alkali Workers of Am., Local Union No. 1. v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157 (1971) 42
Am. Diamond Tool, Inc., 306 NLRB 570 (1992) 30
Amcast Automotive of Ind., Inc., 348 NLRB 836 (2006) 28
American Electric Power, 362 NLRB No. 92 (May 28, 2015) 30
American Freightways Co., 124 NLRB 146 (1959) 25
Atlanta Hilton & Tower, 271 NLRB 1600 (1984) 40
Bath Iron Works Corp., 345 NLRB 499 (2005) 29, 30
Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14 (1st Cir. 2007) 29
Browning-Ferris Industries of California, Inc., 362 NLRB No. 186 (Aug. 27, 2015) 32-35
Capitol Ornamental Concrete Specialties, Inc., 248 NLRB 851 (1980) 26
CEC Chardon Elec., 302 NLRB 106 (1991) 28
Certified Serv., Inc., 270 NLRB 360 (1984) 27
Coca Cola Bottling Works, Inc., 186 NLRB 1050 (1970) 39
Columbia College Chicago v. N.L.R.B., 847 F.3d 547 (7th Cir. 2017) 36-37
Critterton Hospital, 342 NLRB 686 (2004) 43
Eastex, Inc. v. NLRB, 437 U.S. 556 (1987) 26
Ewing v. NLRB, 861 F.2d 353 (2d Cir. 1988) 26
Exxon Shipping Co., 312 NLRB 566 (1993) 43
General Electric, 264 NLRB 56 (1982) 39
Goodyear Tire & Rubber Co., 269 NLRB 881 (1984) 27
Goren Printing Co., 280 NLRB 1120 (1986) 43
Heartland Plymouth Court v. NLRB, 838 F.3d 16 (D.C. Cir. 2016) 30
Holling Press, Inc., 343 NLRB 301 (2004) 27
J&J Snack Foods, 363 NLRB 21 (2015) 39
Keith Miller, 334 NLRB 824 (2001) 25
Keller Manufacturing Co., 272 NLRB 763 (1984) 24
KGTV, 355 NLRB 1283 (2010) 30
Lindsay for & on Behalf of NLRB v. Mike-sell's Potato Chip Co., 2017 WL 2311295 (S.D. Ohio May 26, 2017) 29, 42
Mack's Supermarkets, Inc., 288 NLRB 1082 (1988) 27
Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 30
Meyers Indus., Inc., 281 NLRB 882 (1986), *aff'd* 835 F.2d 1481 (D.C. Cir. 1987), *cert den* 487 U.S. 1205 (1988) 26, 47
Mining Specialists, Inc., 314 NLRB 268 (1994) 31
Murphy Oil USA, 286 NLRB 1039 (1987) 39, 43
Mushroom Transp. Co. v. NLRB, 330 F.2d 683 (3d Cir. 1964) 26
NCR Corp., 271 NLRB 1212 (1984) 30
NLRB v. City Disposal System, Inc., 465 U.S. 822 (1984) 26

TABLE OF AUTHORITIES
(continued)

Page

NLRB v. Okla. Fixture Co., 79 F.3d 1030 (10th Cir. 1996) 30
NLRB v. Savoy Laundry, 327 F.2d 370 (2d Cir. 1964), *enf'g in part* 137 NLRB 306 (1962) 29
NLRB v. Town & Country Elec., Inc., 516 U.S. 85 (1995) 35
NLRB v. United Ins. Co. of Am., 390 U.S. 254 (1968) 35
NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962) 26
Oak Harbor Freight Lines, Inc. v. NLRB, 855 F.3d 436 (D.C. Cir. 2017) 42
Pan American Grain Co., Inc., 351 NLRB 1412 (2007) 39
Peerless Food Prod., 236 NLRB 161 (1978) 29
Peter Vitalie Co., 310 NLRB 865 (1993) 27
Professional Medical Transport, 362 NLRB No. 19 (February 26, 2015) 39
Pub. Serv. Co. of New Mexico v. NLRB, 843 F.3d 999 (D.C. Cir. 2016) 29, 42
Robert Orr/Sysco Food Services, 343 NLRB 1183 (2004) 27
Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976) 29, 42
Ryder Distribution Resources, Inc., 311 NLRB 814 (1993) 28
Sam's Club, a Div. of Wal-Mart Stores, Inc. v. NLRB, 173 F.3d 233 (4th Cir. 1999) 28
St. Vincent Hospital, 320 NLRB 42 (1995) 29
Standard Candy Co., 147 NLRB 1070 (1964) 43
Stanford Linear Accelerator Center, 328 NLRB 464 (1999) 27
Talbert Manufacturing, Inc., 264 NLRB 1051 (1982) 30
The Bohemian Club, 351 NLRB 1065 (2007) 30
The Register Guard, 344 NLRB 1142 (2005) 27
The Toledo Blade Co., 343 NLRB 385 (2004) 39
Tomatek, Inc., 333 NLRB 1350 (2001) 27, 38
Upper Great Lakes Pilots, Inc., 311 NLRB 131 (1993) 28
Vickers, Inc., 153 NLRB 561 (1965) 30
Vought Corp., 273 NLRB 1290 (1984), *enf'd* 788 F.2d 1378 (8th Cir. 1986) 26
Wright Line, 251 NLRB 1083 (1980) 25-29
Yusuf Mohamed Excavation, 283 NLRB 961 (1987) 28

INTRODUCTION

Respondent Orchids Paper Products Co. ("Orchids") hereby respectfully submits this post-hearing brief. The General Counsel filed an Amended Fifth Consolidated Complaint that encompasses charges[1] filed by the United Steelworkers of America (the "Union") against Orchids and Respondent People Source Staffing Professionals, LLC ("People Source"), alleging unfair labor practices in violation of the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*(the "Act"). On June 19, 2017, the Union, People Source, and the General Counsel entered into an informal settlement agreement resolving all allegations made against People Source. A hearing in this matter was conducted on June 20-22, 2017, with the General Counsel, the Union, and Orchids participating. Based on the evidence presented at the hearing, Orchids requests that the Amended Fifth Consolidated Complaint be dismissed in its entirety.

SUMMARY OF CLAIMS

In this case, the General Counsel consolidated seven (7) charges filed by the Union against Orchids and People Source. Consequently, this case involves a myriad of unrelated claims. Orchids addresses each claim below, separating them into the following distinct categories:

> **People Source Employees** – The General Counsel contends that Orchids violated Section 8(a)(1) and 8(a)(3) of the Act by ceasing to use five (5) specific People Source employees who were assigned to Orchids for more than 60 days – Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt. The General Counsel also contends that Orchids violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally deciding to cease using these People Source employees to perform non-production overtime work. Finally, the General Counsel contends that Orchids made a contract modification to the CBA in violation of Section 8(a)(1) and 8(a)(5) of the Act by using these People Source employees for more than 60 days without applying the terms of the CBA.[2]

---

[1] Specifically, it encompasses Cases 14-CA-184805, 14-CA-184807, 14-CA-188413, 14-CA-189031, 14-CA-190022, 14-CA-192908, and 14-CA-199035.

[2] During the General Counsel's Opening Statement at the hearing, the General Counsel contended for the first time that its Section 8(a)(5) claim pertaining the People Source employees applies to more than the five (5) named People Source employees. *See* Tr. at 13. However, the General

Conversion of Lines 6 and 7 – The General Counsel contends that Orchids made a contractual modification in violation of Section 8(a)(1) and 8(a)(5) of the Act by converting lines 6 and 7 to a High Performance Work System, or "Op-Tech" line, without the Union's agreement.

Changes to Health Insurance Plan – The General Counsel contends that Orchids violated Section 8(a)(1) and 8(a)(5) of the Act by making a unilateral change to the health insurance plan and using a new provider.

Changes to Clothing, Shoe and FRC Policies – The General Counsel contends that Orchids violated Section 8(a)(1) and 8(a)(5) of the Act by making a unilateral change to the clothing and shoe policies for all employees. The General Counsel also contends that Orchids violated Section 8(a)(1) and 8(a)(5) of the Act by making a unilateral change to the Flash Retardant Clothing ("FRC") policy for its maintenance employees.

Discipline of Michael Besley – The General Counsel contends that Orchids violated Section 8(a)(1) and 8(a)(3) of the Act by suspending and discipline Michael Besley, a maintenance employee of Orchids, because he refused to comply with the FRC policy.

Union Activities During Working Time – The General Counsel contends that Orchids made a contract modification in violation of Section 8(a)(1) and 8(a)(5) of the Act by prohibiting employees from engaging in any Union activities during working time and on the working floor.

Other Section 8(a)(1) Claims – The General Counsel contends that Orchids interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, on 17 separate occasions. *See* Amended Fifth Consolidated Complaint, at ¶ 6(a)-(q).

SUMMARY OF RELEVANT EVIDENCE AND FINDINGS OF FACT[3]

I. The Parties

Orchids operates a Converting facility in Pryor, Oklahoma, where it converts paper rolls to toilet paper, paper towels, and napkins. Orchids has both Mill and Converting facilities. Tr. at 33-36. Eric Diring ("Diring") is Orchids' Vice President of Operations. Brian Merryman ("Merryman") was

---

Counsel did not introduce any evidence pertaining to any other People Source employees during the hearing, and Paragraph 13(d) of the Amended Fifth Consolidated Complaint refers back to Paragraph 13(a), which alleges that as a result of the conduct alleged in Paragraph 13(a), Respondent discharged the five (5) specifically named employees. Orchids contends that the General Counsel has not pled or introduced any evidence pertaining to any People Source employees other than the five (5) named individuals (and not even all of them) and therefore requests that the General Counsel's claims be limited to the five (5) named individuals.

[3] References to the hearing transcript are designated "Tr.," references to the General Counsel's Exhibits are designated "GC Ex.," references to the Joint Exhibits are designated "Jt Ex.," and references to Respondent Orchids' Exhibits are designated "R Ex."

Orchids' Plant Operations Manager during the relevant time period. Court Dooley ("Dooley") is Orchids' Site Manager. Doug Moss ("Moss") started at Orchids as Human Resources Manager on September 12, 2016. Brad Blower ("Blower") and Kelly Foss ("Foss"), former members of the bargaining unit, are Process Specialists. Kris Thom ("Thom"), a former member of the bargaining unit, is the Safety Lead. Graham Darby ("Darby") is Orchids' Maintenance Engineering Manager. Tr. at 36, 501, 583, 686-87, 764, 713-14, 803.

Orchids and the Union are parties to a Collective Bargaining Agreement ("CBA") for Orchids' Converting facility, effective June 25, 2012 to June 25, 2016. In June 2016, the parties entered into a six (6) month extension with a wage increase. The parties have an oral agreement that the terms of the CBA will remain in effect until a new agreement is reached. The parties have been in negotiations for a new contract since January 2017. Tr. at 37-39, 791-92; GC Exs. 2-3. Chad Vincent ("Vincent") is a Staff Representative for the Union at Orchids' Converting facility. Michael Besley ("Besley") is the Union's Local President, Jason Gann ("Gann") is the Union's Local Vice-President, Darla Reed ("Reed") is the Union's Local Recording Secretary, and Patsy Leidman ("Leidman") is the Union's Local Financial Secretary. Tr. at 32-34, 35, 190, 297, 369-70.

II. Relevant Portions of the CBA between Orchids and the Union

Article 4 – RECOGNITION

> The Company recognizes the Union as the exclusive bargaining agent in respect to wages, hours, and conditions of employment for the Company's employees at its Pryor, Oklahoma, Converting facility with the exception of executives, office, sales, clerical employees, professional employees, guards, watchmen, and supervisory employees as defined in the Labor Management Relations Act of 1947, as amended.

* * *

Article 6 – MANAGEMENT RIGHTS

> The Company has and shall retain the full right of management, the direction of the work force, and its plant operations. These management rights include, but are not limited to, the right to plan, direct, control, increase, decrease, or discontinue operations in whole or in part, to determine products to be manufactured, processed, types of work or methods, to change machinery and methods, facilities, introduce new methods,

processes, techniques, machinery and products; to transfer, suspend, discipline or discharge for just and reasonable cause; hire, promote, to add or reduce the number of shifts, to determine the number of employees it shall employ at any time and the qualifications necessary for any existing or future jobs and to relieve employees from duties because of lack of work or other legitimate reasons.

* * *

It is expressly understood and agreed that all rights heretofore exercised by the Company are inherent in the Company as owner of the business or is incident to the management, and those rights not expressly contracted away by specific provisions of this Agreement are retained solely by the Company.

* * *

Article 8 – GRIEVANCE PROCEDURE

Section 5: . . . It is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if Union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected. . . .

* * *

Article 9 – HOURS OF WORK

. . . At the end of the shift, employees will not leave their workstations until their scheduled shift ends. Employees shall not leave their workstation until relief has reported at the workstation and properly accepted the responsibility of the position. . .

* * *

Article 16 – MOVEMENT OF PERSONNEL – BIDDING

Section 7: The Company retains the exclusive right to determine whom its employees shall be and from what source(s) they will be chosen outside of the bargaining unit.

* * *

Article 23 – UNION OFFICERS ACCESS TO PLAN

. . . [O]ther official Union business will be considered for legitimate entry to the plant provided that neither the Union nor its officials shall interfere with the Company's business or operations at any time during such visitations to the plant. . . .

Article 24 – GROUP INSURANCE/401K/DISABILITY

b. Medical/Dental Benefits: The Company cannot guarantee what type of coverage can be offered in the future. For that reason types of healthcare will not be specified. The Company will pay 80% and the employee will pay 20% of whatever plan the employee chooses or is available.

* * *

Article 37 – LINE 8 AND ANY NEW LINE

This language is to outline the operation and requirements to staff a new line including

hours of work, shifts, and pay.

- Op-techs will be expected to operate and conduct running maintenance on all pieces of equipment contained in the new line (line 8). They will also use lifts to supply paper and vitals to the line.

* * *

- After the successful startup of the line, the company may entertain the idea to expand this opportunity to line 7 and/or line 6. The understanding is both parties will discuss and must agree before expanding cell concept to existing lines.

Tr. at 72; GC Ex. 2 at 2, 3, 5, 9, 12, 13, 15, 29.

III. People Source Employees

A. Background

Orchids uses workers from temporary staffing agencies on an as-needed basis. These workers perform non-skilled tasks for Orchids, such as removing Display Ready Products ("DRPs") from a conveyor and hand stacking them on a pallet. They also clean, sweep, and wipe down the periphery – areas where they had access and were not restricted. Tr. at 71-72, 149-51, 170-77, 805-06. On February 24, 2015, Orchids and People Source entered into an agreement. Tr. at 158; Jt Exs. 40-42.

People Source is a staffing company that assigns its temporary associates to work at various companies. It has offices in Colorado, Texas, Louisiana, Arkansas, and several offices in Oklahoma (Claremore, Tulsa, and 2 offices in Oklahoma City). Melanie McMains ("McMains") is the Senior Recruiter and Payroll Specialist in People Source's office in Claremore. Tr. at 855-57, 915.

People Source recruits its employees in various ways, including on social media and by putting signs on roads near particular clients. People Source has never recruited employees to work at Orchids, either on social media or with signs near Orchids' facility. Tr. at 910-12. Applicants for employment with People Source submit People Source applications, not Orchids applications. Tr. at 158, 180, 911. People Source reviews the applications and interviews applicants for employment. During the interview, People Source asks applicants about their past jobs, general skill sets, qualifications, what

type of job they are seeking, and their requested pay. People Source does not ask specific questions about clients (such as Orchids) during the interview. Orchids does not interview any People Source applicants for employment. Tr. at 807, 911-12. People Source conducts background checks and drug screens for its applicants for employment. Orchids does not conduct any background check or drug screen for People Source employees. Tr. at 810, 915. Upon hiring an applicant as a People Source employee, People Source conducts an orientation for its new employees, completes onboarding paperwork, and provides the employees with a People Source employee handbook, not an Orchids' handbook. Tr. at 160, 808, 912-14.

People Source then places new employee on an assignment with one of its clients based on the employee's skills and experience and client needs. Tr. at 911. Orchids does not have the right to fire, suspend, or discipline People Source employees. Orchids does not have access to any People Source personnel records for People Source employees. Tr. at 809-10.

Because Orchids is one of People Source's clients, People Source set up a time clock at Orchids' facility for People Source employees who were assigned to Orchids. People Source employees use their own time clock and their own time cards at Orchids. This time clock is located in a different area of the facility than the time clock used by Orchids' employees. Tr. at 159-60, 180, 808, 867-68, 874. Upon receiving a transmission of its employees' time cards, People Source then enters the time for each of its employees into its payroll system and verifies the payroll. People Source uses a work week of Monday to Sunday for its employees. Tr. at 868-73.

Payroll is then sent by People Source to its corporate office in Oklahoma City for another round of verification and administration of the funds to its employees. Orchids never pays People Source employees. Tr. at 159, 180, 808, 872-75. People Source employees who were assigned to Orchids did not receive an Orchids' badge. Orchids' employees all have badges with RFID chips that they use to

access the barrier guards for equipment. People Source employees were not able to access these areas, but were required to stay outside and not cross the doored enclosure. Tr. at 159, 169, 806, 809.

By contrast, Orchids hires its own employees. Individuals who have submitted a resume for a job with Orchids are interviewed by Orchids, then required to obtain at least a silver on a Work Keys test administered by WorkForce Oklahoma. Applicants must also pass a very basic mechanical aptitude test. After an applicant is selected for employment, Orchids then conducts a drug screening process and a background check. Tr. at 807. New employees of Orchids participate in a 3 to 4 day orientation process. This orientation process is not provided to the People Source employees. Tr. at 808. Orchids' employees are required to attend shift meetings. People Source employees do not participate in shift meetings. Tr. at 808.

B. Communications between Orchids and the Union

In late July 2016, Merryman and Dooley requested a meeting with the Union to discuss some Union matters. On August 4, 2016, Merryman and Dooley met with Vincent, Besley, and Gann. Tr. at 812-15. Orchids had recently terminated the employment of Carla Gritts ("Gritts"), its previous Human Resources Manager, and, during this meeting, Vincent told Merryman and Dooley that Orchids had made a grave mistake in firing Gritts, implying that he was going to impose consequences for Orchids' decision. Tr. at 812.

Before Merryman or Dooley could raise any agenda items, Vincent raised the issue of People Source employees. Vincent told them that People Source employees were doing work that should be done by members of the bargaining unit. Tr. at 127, 813. Vincent was very agitated about this issue, and he pounded his fist on the table, saying it was his labor and his work, and he was over everything that occurred inside the facility, and his people should be doing the work. Vincent's comments were extremely confusing to Dooley, but Vincent "made it abundantly clear that he was very displeased with [Orchids'] use of temporary labor in the facility. That part was abundantly clear." Tr. at 813-14.

As a result of this meeting, Merryman and Dooley made a decision to suspend the use of all temporary employees until the matter was resolved. Orchids reached this decision "because the meeting and the demands of Vincent were very unclear, and they weren't exactly specified. But, again, he was very clear that he was extremely disappointed with the usage of the temporary labor, so Merryman and I made a decision until this matter was resolved we were going to suspend the usage to, you know, kind of unmuddy the waters, you know, until we could work on a resolution to this." Tr. at 814-15. After the assignment at Orchids' ended, no one ever told People Source that they should fire any of the employees who had been assigned at Orchids, but rather was told that the People Source employees were no longer needed by Orchids. Tr. at 181, 817, 845-46, 914.

After Orchids suspended the use of the People Source employees, the work previously performed by the People Source employees still needed to be done. Dooley and Gann had a discussion about how the work should be accomplished. Gann testified that he said the People Source employees were doing work that should be done by the bargaining unit and talked about hanging a volunteer sheet to do the work that the People Source employees had been doing. Tr. at 202-04, 817-19. Dooley offered to hang a sheet for volunteers to sign up for overtime, then draft any unfilled slots per the terms of the CBA. Gann told Dooley he thought this was a bad idea because people on the floor were not going to respond well to being drafted to stack DRPs on pallets. Tr. at 817-18. A volunteer sheet was posted on the personnel board for any Orchids employee to sign up for overtime to perform the work the People Source employees had been performing. Not a single employee of Orchids signed up for overtime. "Zero." Orchids therefore began drafting for the overtime from the bottom of the seniority list, per the terms of the CBA. Tr. at 819-20.

On August 12, 2016, Vincent sent an email to Dooley addressing some "confusion as to the direction to go on probationary employees" and providing a "detailed explanation on how this issue

should be resolved." Tr. at 52; GC Ex. 4. Dooley responded on August 16, 2016, disagreeing with Vincent's email and clarifying that these workers are employees of People Source, not Orchids, and thus are not covered by the CBA between Orchids and the Union. Tr. at 53; GC Ex. 5.

On August 16, 2016, the Union submitted Grievance No. C17-16, stating that the nature of the grievance was "on behalf of all the temps over the 60 day probation." Orchids responded on August 18, 2016, stating that these workers are employees of People Source, not Orchids, and were not covered by the CBA or performing work that was covered by the CBA. Tr. at 53-54, 65-67; GC Ex. 10.

On August 18, 2016, Vincent requested additional information about hiring of "employees" through a temporary agency and requesting a response by August 26, 2016. Tr. at 54-55; GC Ex. 6.

Because Orchids was not receiving any volunteers to do the work previously done by the People Source employees and had to draft for someone to do the work, Gann requested a meeting with Dooley, and, on August 24, 2016, submitted Grievance No. C19-16, stating that Orchids should recall the People Source employees before forcing overtime. Gann testified that Dooley told him the People Source employees identified were no longer at Orchids because "I had told him that they could not use temps. It was – told him he had to get rid of them." Tr. at 65-67, 221-23, 820-22; GC Ex. 11.

At the meeting, Gann expressed that "the membership was unhappy with the drafting process by essentially people being forced to perform this task." He requested that Orchids start using temporary labor again to perform these tasks because of the personal pressure he was receiving from the membership by those drafted to do the work. Dooley reiterated that until the appropriateness of the usage of temporary workers to perform the labor was resolved between Orchids and the Union, Orchids would only use its own employees to perform this work. Tr. at 221-23, 820-22. In response, Gann "stated that the Union did not care about these temps. That was his exact phrase. This is Chad's deal, and he was not going to leave it along – he was a dog with a bone [sic]." Tr. at 821.

On August 25, 2016, Dooley responded to Vincent's request for information – providing the requested information for nine (9) individuals that Orchids hired as its own employees in the past two (2) years who had previously worked for a temporary agency. Tr. at 54-56; GC Ex. 7. On September 5, 2016, Vincent sent another request for additional information. Dooley responded on September 12, 2016, stating that it did not have most of the requested documentation because it did not maintain files for the People Source employees. People Source maintained those files. Tr. at 58-60; GC Exs. 8-9.

On September 14, 2016, a third-step meeting was held on the grievances. Vincent, as well as the Union's Local Officers, were present at this meeting. At this time, Orchids proposed to take the five (5) affected individuals through the standard hiring process and create a new job classification under the CBA. Tr. at 66; GC Ex. 10. During this meeting, Vincent and the Union's Local Officers brought up for the first time that they had collected Union cards from the People Source employees. This was the first time that Dooley or Orchids' management heard about possible Union cards for these individuals. Tr. at 815-16.

On September 22, 2016, Orchids followed up with its proposal at the third-step meeting, and Diring sent an email to Vincent again reiterating willingness to negotiate bringing the People Source employees into the bargaining unit. Tr. at 67-68; GC Ex. 12.

In response to the continued dissatisfaction raised by Orchids employees, Gann met with Diring, and they reached a verbal agreement regarding the performance of the work previously performed by the People Source employees. Specifically, they agreed that Orchids would develop a process to allow its own employees to volunteer for these positions and, if the positions were not filled by volunteers, Orchids would resume using People Source employees to perform this work, but would not use them for more than 60 days. Tr. at 135, 221, 822-23.

As Orchids had not received a response to its proposal from the third-step meeting as detailed

by Diring in his email, Dooley then followed up with another email on October 4, 2016. In this email, Dooley responded to the grievances, clarified the understanding between Diring and Gann to allow Orchids to resume using People Source if the positions were not filled by volunteers, and again made the offer from Diring's email proposing to create a new job classification. Tr. at 68-70; GC Ex. 13.

C. Named People Source Employees

Carrie Bunnell ("Bunnell") was an employee of People Source. Bunnell began receiving assignments through "Melanie" at People Source to work at Orchids on variable schedule starting around September 2015. If she was going to be absent from work, she notified People Source. Bunnell testified that she was doing light cleaning and hand stacking of DRPs. Bunnell also testified that Melanie at People Source told her in about October 2015 that she was going to be a "permanent temp," at which time she was on the "D" shift, a twelve-hour shift, rotating shift, at four-on/four-off, and eventually was assigned the robots with "Roger," an Orchids, employee, and several other temporary workers. Bunnell's pay from People Source did not change when Melanie told her she was going to be a "permanent temp." Tr. at 164-66, 171-64, 183-84.

Rebecca Scott ("Scott") did not testify at the hearing. According to People Source, the first day of Scott's assignment to Orchids by People Source was on September 29, 2015. Scott accepted an opening on B crew at Orchids with People Source on January 4, 2016. GC Ex. 32; GC Ex. 37.

John Aguilar ("Aguilar") did not testify at the hearing. According to People Source, the first day of Aguilar's assignment to Orchids by People Source was November 20, 2015. GC Ex. 34 at 5.

Brandon Glory ("Glory") did not testify at the hearing. According to People Source, the first day of Glory's assignment to Orchids by People Source was on January 8, 2016, and Glory accepted an opening at Orchids with People Source on February 10, 2016. Tr. at 888; GC Ex. 29; GC Ex. 35.

Jennifer Whisenhunt Gwinn ("Whisenhunt") was an employee of People Source in Claremore, Oklahoma. Whisenhunt began receiving assignments through "Melanie" at People Source to work at

Orchids whenever Orchids had assignments, starting around March 2016. Tr. at 146-48. Whisenhunt testified that she did DRP hand-stacking work with other temporary workers when she was at Orchids. She learned how to perform that work "[b]y watching the other temps and other tempts showing [her] and telling [her] how to do it." Tr. at 149-51. Whisenhunt did not know if anyone was supervising her, and if she had a problem on the line, she would go to other People Source employees. In August 2016, she "became a permanent temp," at which time she was on a four-day on/four-day off, or night-on/night-off schedule and began sweeping, changing out the piece of cardboard on the core machine, taking off bad roles, and using an air gun to spray out the dust from the toilet paper. Foss told her she would be a "permanent temp," which she interpreted to mean she would not be laid off, but that she was still a temporary employee working for People Source. When asked who supervised her work after this change, Whisenhunt testified "I can't really say, because I am not really sure, but I know I was supposed to check in with Kelly after, Kelly or his wife." Whisenhunt's pay did not change any at that time. In fact, she testified that "[n]othing changed in me going into the building and clocking-in and clocking-out. Nothing changed. I mean, I would usually go in – Kendra, Kendra is Kelly's wife, anyway, I would usually go in there and ask her and she would tell me the same thing every day to do the same thing. Go around and sweep, check on the lines." Tr. at 146-55, 156, 158-61.

IV. Conversion of Lines 6 and 7

Orchids operates several rewinding production lines in its Converting facility. Lines 8 and 9 are newer High Performance Work System ("HPWS"), or "Op-Tech" lines, that have a much higher production than the older lines as employees are able to flow to the work on the line as needed and not only trained on a single machine. Tr. at 73-74, 852-54. In order to increase production and lower the price point for its product, Orchids has been in the process of updating the older lines for several years – even before the last contract negotiation in early to mid-2012 with the new Line 8. There was discussion about upgrading Lines 6 and 7 to an "Op Tech" line with the Union's Local Officers as

early as the very beginning of 2016, and there was no pushback, but only some discussion about whether Orchids should grandfather those on the line with an opt-out provision or whether Orchids should empty the work cell and allow everyone to bid. Tr. at 825-26.

Orchids' management initially thought the language in the CBA pertaining to the upgrade of Lines 6 and 7 to "Op-Tech" lines was ambiguous as the CBA specifically references Lines 6 and 7 and not any of the other older lines. Tr. at 274, 828. On August 4, 2016, Merryman told Vincent that he would like to discuss the process of converting Lines 6 and 7 to "Op-Tech" lines. Tr. at 73, 826-27. On October 7, 2016, Dooley sent a proposal to Vincent providing that pay rates would be standard with Op-Tech classifications and guidelines and providing a proposal to allow current line team members to stay on Lines 6 and 7 or to opt-out and move to Lines 1, 2, 4, or 5, the older lines. Tr. at 75, 827-28; GC Ex. 14. On October 17, 2016, Vincent responded and that the Union was not agreeable at this time to transitioning lines 6 and 7 to the Op-Tech system. Tr. at 77, 135-39; GC Ex. 15.

Dooley learned from another management employee that Chris Montoya ("Montoya"), who was formerly a Union Committee Member and was involved in the 2012 negotiation for the CBA, said that Lines 6 and 7 had already been negotiated in 2012 in the negotiation of the previous contract. Upon learning this, Dooley reached out to Montoya, as well as Willa Wright ("Wright"), the Union Local President at the time of the last contract negotiations, to confirm. Wright said that Lines 6 and 7 had been negotiated and reaffirmed that Montoya was correct. Tr. at 828-30. Thus, on October 18, 2016, Dooley responded to Vincent and stated that since this issue was previously negotiated and Lines 6 and 7 were included in the CBA, Orchids would effectively transition Lines 6 and 7 to the Op-Tech system beginning January 9, 2017, due to the timing of the capital project on Line 6, again providing the proposal about the process for the transition. Tr. at 77-78, 829-30; GC Ex. 16. Vincent replied that the Union's position was not changing and they were not in agreement. Tr. at 81-82; GC Ex. 17.

V. Changes to Health Insurance Plan

When Moss started at Orchids as Human Resources Manager on September 12, 2016, Orchids had outgrown its benefit plan and the current provider was proposing a 13% across-the-board increase from the previous year. Moss therefore immediately began looking for a new benefit package for Orchids. Tr. at 764, 773-75. A new broker who had experience in the union environment, Lockton Services, was retained. Lockton was directed to find a new medical plan and to "mirror or clone the most popular plan" provided by Orchids. Tr. at 774. Lockton provided several options, and upon reviewing them, Orchids identified United Healthcare (UMR) as its new plan. Premiums under the new plan were less than the 13% increase in the current plan, and the new plan expanded the network and eliminating the need for primary care physician referrals as any physician in network is now available to employees enrolled in the plan. Tr. at 776-80; GC Exs. 18-19. Open enrollment meetings were held for employees in December 2016, for enrollment by January 1, 2017. Tr. at 779-80.

Moss testified that he was only aware of one instance where the plan change caused any impact to an employee. In that case, he was made aware of a prescription that was higher than it was on the previous coverage, so he called the carrier and the employee's payment was changed the same as it was before. All copays remained the same as the previous plan. Tr. at 794. Orchids continued to pay 80% of the plan, and the employees paid 20%, deductibles and out of pocket maximums did not change, and Orchids continued its practice of reimbursing deductibles for employees. Tr. at 775, 780.

VI. Changes to Clothing, Shoe and FRC Policies

A. OSHA Investigation and Clothing and Shoe Policies

Kris Thom, who was an Op-Tech on one of the lines and a member a bargaining unit, was promoted to Safety Lead for Orchids in February 2016. Tr. at 501-02. Later that year, in December 2016, Zachary Grinnell ("Grinnell"), an OSHA Inspector with the U.S. Department of Labor, came to the facility and said OSHA had received a list of complaints made against Orchids for unsafe working

conditions. Grinnell provided a Notice of Alleged Safety or Health Hazards that included:

4) Maintenance and production employees not adequately trained on Electrical safety work practices and lack proper PPE for electrical work.
5) NFPA 70E identification is lacking on electrical equipment.
14) PPE hazard assessment are not in compliance.

Tr. at 502-06, 553-54; Jt Ex. 1.

Grinnell, along with Thom, Dooley, Darby, and Moss with Orchids, Reed with the Union, and Bernardo Estrada, Jr., with Orchids' insurance carrier, spoke about each of the complaints and did a full walk-through inspection of Orchids' Converting facility. Tr. at 503-07. Grinnell then returned to Orchids' facility on February 9, 2017, to witness a blowdown on a production line. Along with the same group from Orchids and the Union, Thom, Dooley, Darby, Moss, and Reed, he also brought up three (3) additional safety complaints he had received since his December visit pertaining to (1) an accident they had recently, (2) the amount of fire extinguishers, and (3) wanting to see FR equipment for maintenance employees. Tr. at 507-08.

On February 23, 2017, Orchids received a Citation and Notification of Penalty for violations of OSHA. The OSHA Citation included Notification of a total of $23,540 in penalties, and a Citation for three (3) main items. The first item pertained to blowdowns. The third item pertained to machine guarding. The second item was a 3-in-1 violation based on Orchids not having a Hazard Assessment completed and certified by a third party and requiring employees to use appropriate personal protective equipment ("PPE"). Tr. at 508-12; Jt Ex. 2. A Hazard Assessment entails going through various parts of equipment, jobs, tasks, and anywhere there are hazards to re-engineer the mount or the procedures to minimize or eliminate a hazard, as required by 29 C.F.R. 1910.132(d). Tr. at 511; Jt Ex. 2.

Upon receiving the Citation and Notification of Penalty, per the instructions in the accompanying documents, Thom called David Bates with OSHA to schedule a phone conference to discuss an abatement to lower the citation penalty. Tr. at 512-13. A phone conference was scheduled

for On March 13, 2017, and Thom posted a Notice to Employees of Informal Conference. Tr. at 514. On March 13, 2017, Thom, along with Dooley, Moss, and Darlene Russell, had a phone conference with Bates from OSHA to discuss abatement, including the completion of a Hazard Assessment, training, and rollout of PPE policies. Tr. at 515-19, 521-22.

On March 22, 2017, Daniel Shaw, Safety Coordinator for Northeast Technology Center, went through the facility to the different lines, asked questions, watched the different jobs being performed, and determined PPE that may be needed to abate any hazards. He then certified that he conducted this Hazard Assessment. Tr. at 519-22, 530-32; Jt Ex. 7; Jt Ex. 8.

As discussed during the previous phone conference with Bates, Orchids received a proposed Informal Settlement Agreement from Bates with a lowered penalty amount of $9,000 and an agreement to comply with and certify that abatement has been completed. Specifically, Orchids agreed to abate the citation pertaining to a Hazard Assessment and PPE by having a Hazard Assessment completed and implementing PPE requirements based on the Hazard Assessment. The settlement agreement also provides that OSHA can come back to the facility and revisit to make sure the abatements are being upheld. Tr. at 523-24, 530-32, 581; Jt Ex. 3.

In compliance with this settlement agreement, Orchids drafted Clothing and Shoe policies for Employees and for Contractors, Vendors, and Visitors based on the Hazard Assessment. These policies became effective April 29, 2017, the date required for compliance by OSHA as part of the settlement agreement. Tr. at 527-29, 550; Jt Ex. 4. On April 26, 2017, Thom sent a Certification of Corrective Action to OSHA, which included the Clothing and Shoe Policies for Employees and Contractors, Vendors, and Visitors, a portion of the Hazard Assessment, and information on other abatements. Tr. at 525-31; Jt Ex. 4.

Orchids held meetings about these new Clothing and Shoe policies on March 23, March 28,

March 31, and April 4, 2017. Additionally, instructors from Northeast Technology Center conducted another set of trainings over the use of PPE on April 10, April 12, April 17, April 28, and May 23, 2017. Tr. at 532-38; Jt Exs. 12-15; Jt Ex. 17. During one of the meetings conducted by Thom and Moss, two employees, Darla Reed and Darlene Russell, began screaming at them using vulgarities in front of more than 30 other employees. Moss ended this meeting and told Reed and Ms. Russell in a separate meeting that "if they had objections to the policies and they felt that strongly about it, if they wanted to cuss [him] or raise their voice at [him] to do so before the meeting or after the meeting in [his] office or in some other office but not to conduct themselves that way in a company meeting." Tr. at 534-35, 539-42, 786-88.

Upon receiving a request to bargain, Orchids and the Union decided to meet at the end of a day that they were already scheduled to be in negotiations for a new labor agreement. Thus, local leadership from the union for the Mill came to the contract negotiations around 4:30 or 5:00 p.m. on April 12, 2017. Vincent, Besley, Gann, and Reed were all present with the Union, along with Dooley, Moss, and Thom for Orchids, as well as some of the leadership from union for the Mill (who wanted to discuss hooded sweatshirts). Thom went through the policies and the Hazard Assessments. Tr. at 96-110, 542-45. During this meeting, Thom went through the policies and the Hazard Assessments, and there were several discussions from Converting's Union Local Officers about shorts, which were not permitted under the policy. Thom discussed the Hazard Assessment and the lack of leg protection provided by shorts and thin pants (leggings) and said that there had been three (3) leg injuries the previous year. Tr. at 542-45, 580. Based on the issues raised by the Union, Orchids agreed to purchase some shirts, a sweatshirt, and a hooded jacket for employees. Tr. at 834-35; Jt Exs. 24-26.

B. Arc Flash Compliance with NFPA 70E and FRC Policy

Graham Darby, Maintenance Engineering Manager for Orchids, has worked in maintenance for over 20 years and has been in similar positions to his role with Orchids for the past 12-15 years.

His role for the last three companies he has worked for is to develop maintenance processes, procedures, and teams, particularly in light of more high-speed, highly electrical technical equipment. Tr. at 583-84, 602-03. Darby has significant experience with Arc Flash Studies and NFPA 70E, and he knew when he began at Orchids that Orchids needed to become compliant with NFPA 70E for safety reasons. Tr. at 587-90, 602-03. During the separate August 2016 meeting with Merryman and Dooley, Vincent requested that the company address the arc flash, as it was his understanding that the law on arc flash was legally already supposed to have been implemented. Tr. at 141-44. Specifically, Vincent requested that Orchids "try to get compliant on that particular piece of the law," which requires a bringing in a "third party" to do an evaluation of arc flash equipment. Tr. at 141-44.

According to Vincent, National Fire Protection Association 70E, or "NFPA 70E," is a system administered by OSHA that refers to rating electrical cabinets and determining protective equipment to be worn while working on those machines based on the rating. In fact, lack of compliance with NFPA 70E was raised by OSHA in its initial communications with Orchids. Tr. at 141-44; Jt Ex. 1.

As an Arc Flash Study is a significant expense, at Darby's request, Orchids approved a capital expenditure request of $82,000 in September 2016 to retain IPC Solutions to perform this Arc Flash Study. Tr. at 590-94; R Ex. 5. According to Darby, the electrical engineers with IPC were on-site at Orchids' Converting facility for about nine (9) weeks in late 2016 and early 2017, constantly walking through the plant taking readings, inspecting equipment, inspecting breakers, inspecting panels, obtaining information needed to be able to conduct the Arc Flash study. Tr. at 597-98, 658. The Arc Flash Study breaks out electrical components and provides every piece of equipment an arc flash rating, indicating what type of clothing is required based on the rating. Tr. at 599-606, 658-60; R Ex. 4. Arc flash rated clothing is coated with a material to protect any fire from burning and must be measured for each employee to ensure that it covers all exposed skin. Orchids hired CINTAS to take

the measurements and provide the flash retardant ("FR") clothing. CINTAS began fitting the Maintenance employees at Converting for the FR clothing around February 2017 based on the preliminary results of the Arc Flash Study. Tr. at 603-11.

Maintenance employees at the Mill, where it is hotter than at the Converting facility, have been wearing the FR clothing for about five (5) years. Tr. at 656-66, 835-38.

Darby had meetings and trainings with each shift of Maintenance employees at Converting, and all Maintenance employees (including Besley) were issued FR clothing by Orchids. Besley received his FR clothing on May 3, 2017. Tr. at 613-18; Jt Exs. 19-20. These meetings were at the end of April and beginning May 2017, and Darby announced that there would be a one-month coaching time, then the FRC Policy would be effective June 1, 2017. Tr. at 616-21, 667. Darby was clear with all the Maintenance employees that the FR clothing should be worn at all times and did not make any exceptions. Indeed, the OSHA Citation specifically noted Orchids' failure to provide such clothing as a safety issue. Tr. at 420, 443, 616-21, 699, 705-06; Jt Ex. 2.

VII. Discipline of Michael Besley

Richard Keith and Matt Rhodes are Maintenance Planners/Schedulers for Orchids. They report directly to Darby. Keith Winn, a member of the bargaining unit, is one of the maintenance shift leads – specifically, the shift lead for the "D" shift that includes Besley. Tr. at 369, 416, 623, 691, 700-01, 795-96.

With the exception of fit issues, the **only** Maintenance employee who refused to wear the FR clothing was Besley. Tr. at 625, 699, 705-06. Just days after receiving his FR clothing and participating in the training sessions on May 3, 2017, Besley was not wearing the FR clothing. On Saturday, May 6, 2017, at around 7:30 a.m., Keith walked around and saw the Maintenance employees wearing the FR clothing. He saw Besley at about 8:15 a.m., and Besley was wearing his face shield (which was not required) and his FR pants but was not wearing his FR shirt. When asked why he was

not wearing his FR shirt, Besley to Keith that it did not fit. Keith said he would look into it on Monday and left. Tr. at 622-25, 702-04; Jt Ex. 29. Around 11:00 a.m. later that morning, Rhodes walked around and saw the Maintenance employees, with the exception of Besley, wearing their FR clothing. Another Maintenance employee, Corey Pendleton, did not have his Orchids' FR shirt on because CINTAS (the company that had measured and was providing the shirts) had his shirt out for repair, but he was wearing an FR shirt on from his previous employer. When asked why he was not wearing his Orchids' FR shirt, Besley responded that Orchids and the Union had come to an agreement during negotiations that it would only be worn in an electrical cabinet. Rhodes reminded him about the meeting a few days prior with Darby where Darby specifically said that the clothing was to be worn at all times. Unlike what he told Keith, Besley did not mention anything about his shirt not fitting to Rhodes. Tr. at 107-09, 694-96; Jt Ex. 30 at 8.

Upon talking with each other and Darby, and hearing the conflicting stories from Besley, both Rhodes and Keith went back the following day, on Sunday, May 7, 2017. While working in the office early that morning, Rhodes and Keith saw Besley walk by without any FR clothing. They told him that he needed to put it on or there would be consequences. Besley responded with "That's fine, this is a great day for a bike ride." Thus, they asked if he wanted to get Union representation. Tr. at 696-97, 704-05; Jt Ex. 29; Jt Ex. 30 at 8. Besley said he did want Union representation and returned with Corey Pendleton. As Rhodes knew that a Steward was needed for Union representation, he asked Pendleton if he was a member of the Union. When Pendleton said no, Besley called Gann. Tr. at 697. Rhodes and Keith told Besley that he would be suspended if he did not wear the FR clothing. Besley said, "That's fine." Gann then asked him, "How many teams of management have you seen go through this place? How long do you think this management will take before they are out of here? Why don't you just put it on and we will fight it?" Besley then put the FR clothing on (including the face shield,

which was not required to be worn at all times) and said he would do it so his crew would not be shorthanded. Tr. at 697-99, 704-05; Jt Ex. 30 at 8.

Despite these clear directives from his Darby, Rhodes and Keith, Besley decided that he was not going to wear the FR clothing. Tr. at 625-66. Besley was coming to work in normal street clothes, clocking in without changing into his FR clothing, attending the shift change meeting without FR clothing, then taking an excessively long time to change into his FR clothing before starting to work. After doing this for several days in a row – despite the clear directive from Orchids' management – Besley was suspended on May 15, 2017. Tr. at 685; Jt Ex. 30, at 11; Jt Ex. 31.

Dooley and Besley saw each other in the hallway around this time. Besley had a conversation with Besley where he asked him to remember the original intent of the safety policies and practices to keep employees safe so that they go home in the same manner as they come to work and asked him to help with the process as a leader in the facility. Dooley did not tell Besley he was held to a higher standard because of his position with the Union. Tr. at 833-34.

Since around September or October 2015, Orchids has used a Computer Maintenance Management System, or "CMMS," to manage the effectiveness of its equipment. Employees have to log in to the CMMS system at the start of their shift to find their workload for the day, then they log in on different work orders of different pieces of equipment. Tr. at 626-34. Darby testified that he always received feedback from other Maintenance employees that Besley could often not be found. Winn, a bargaining unit member and the shift lead on Besley's shift, maintained a log of notes on his frustrations with Besley. Besley had previously received discipline for his work performance, being removed from his lead role in mid-2016. Tr. at 455-56, 475-80, 635-40; Jt Ex. 31; R Exs. 1-3. As part of its investigation while Besley was suspended, Orchids pulled its CMMS records for Besley to assist in the investigation. The CMMS records showed that Besley would not log in at the beginning of his

shift for much longer than the fifteen (15) minute window – in some cases, for 108 minutes, 87 minutes, 118 minutes, 67 minutes, 177 minutes, 87 minutes, etc. Based upon review of the CMMS records, Darby concluded that Besley was improperly utilizing the CMMS system and that his work production falls well below company expectations. Tr. at 636-53; R Ex. 6; Jt Ex. 32.

Besley was suspended four (4) work days, from May 15-23, 2017, and he was paid for that time. Upon returning from suspension on May 23, 2017, Besley met with Darby, Moss, and Gann, and was given a written warning set forth his performance expectations. This Employee Warning Notice listed several specific violations, including insubordination, falsification of records, and violation of safe practices and safety rules. It also provided the results of the investigation. Tr. at 634-35, 653-56; Jt Ex. 32.The next day after this meeting, Besley arrived and work and did not log in to CMMS. Thus, Moss, along with others, had another meeting with Besley. During this meeting, Moss told Besley that he should contact Thom, the Safety Manager, Darby, the Maintenance Engineering Manager, or himself if there is a safety issue in the plant so that they can address it immediately. He did not threaten Besley or tell him not to call OSHA. Tr. at 789-91.

VIII. Other Section 8(a)(1) Alleged Violations

Dooley has never made a statement to anyone that any of the People Source employees were discharged because they sought to be included in the Union. Tr. at 831. Dooley has also not made a statement to anyone that he or she is not being considered for employment because they decided to be included in the Union. Tr. at 831. Additionally, Dooley never told any employees that they were prohibited from talking about the Union. Tr. at 833.

On November 15, 2016, Andrew Mason, an Op-Tech and member of the bargaining unit, provided a written complaint to Moss concerning Reed. Specifically, Mason was concerned that Reed was trying to get people fired who were supporting decertification efforts at Orchids. Tr. at 756-60, 770-72; R Ex. 11. Shortly thereafter, around November 26, 2016, Moss received another complaint

about Reed saying she was going to get everyone who signed the decertification petition fired as soon as she received the list – this time from Kade Robbins, another member of the bargaining unit. Tr. at 732-33, 769-71; R Ex. 13. Moss investigated the complaints and, with Dooley, met with Reed to inform her about the complaints and reinforce that during worktime, she was to be in her work area conducting work, not going to different areas and trying to intimidate other employees. Dooley said he did not know if these statements had happened, but, if they had, he asked her to please discontinue it because they need to respect the rights of the individuals the same as he respected her rights. Reed was not disciplined or reprimanded. Tr. at 300-09, 769-73, 831-32.

On February 6, 2017, David Lawson, an Op-Tech and member of the bargaining unit, sent two (2) emails to Brad Blower claiming that he felt like he was harassed by Reed and Chris Montoya. Lawson testified that he had been harassed by Reed and Montoya on more than one occasion. Blower testified that this was not Lawson's first complaint about this, but was the only one he put in an email. Tr. at 718-22, 739-43; R Exs. 7-8. Blower and Foss met with Reed and told her they had reports she was harassing people on the floor and that, if it was true, to please stop. Reed was not disciplined or reprimanded. Tr. at 305-09, 687-89, 723-25; Jt Exs. 33-34. Blower and Foss then immediately went and met with Montoya at the warehouse and told him that they had complaints he was harassing employees on the floor. Montoya yelled back at them threatening to call Orchids' President about them and stormed off to the break room. Tr. at 687-89, 725-28; Jt Exs. 35-36.

On February 7, 2017, Orchids received a statement from another employee and bargaining unit member, Johnnie Mason, who testified that Montoya directed a threat to Mason and her family as a result of her husband's Facebook postings regarding the Union. Moss investigated the complaint, and Montoya's employment was terminated. Tr. at 313-14, 750-51, 780-85; Jt Ex. 38.

In January 2017, Moss and Blower met with Gabriel Cutler ("Cutler"), who had left his line

and had been outside for over an hour. Gann was present with Cutler. Tr. at 235-39. Gann said that it was his understanding that employees did not have to be at their job as long as someone was in the spot running their machine. So, he called Diring, Orchids' Vice President of Operations, and put him on speaker phone. With Diring on the phone, Gann called Orchids' manager liars, or "f---ing liars." Tr. at 235-42, 272-73. After the meeting, Dooley called Gann and asked to meet with him. Dooley and Moss met with Gann and John Stafford. Dooley told Gann that he did not need to talk to management employees as he did, but this statement was not because he was engaging in Union work, but only because of his actions during the meeting. Dooley never told any Gann, or anyone else, that he was being watched. Tr. at 243-46, 272-73, 832. Dooley also told Gann that he had received reports that Gann was leaving his workspace to do Union business when he was supposed to be working. Dooley asked Gann to let someone know when he has to leave his workspace. Gann did not receive any discipline for any of his actions. Tr. at 243-46, 272-73.

AUTHORITIES AND CONCLUSIONS OF LAW APPLIED TO FACTS

The General Counsel has the burden to prove by a preponderance of the evidence the facts sufficient to show alleged violations of Section 8(a)(1), 8(a)(3), and 8(a)(5) of the Act. 29 U.S.C. § 160(c) (stating that violations of the Act can be adjudicated only "upon the preponderance of the testimony" taken by the NLRB); 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof"). The General Counsel cannot sustain its burden of proof by only discrediting any of Orchids' evidence. *Keller Manufacturing Co.*, 272 NLRB 763, 766 (1984). Rather, in order to prevail, the General Counsel must support its case with substantial evidence and Orchids must fail to counter with affirmative evidence of its own. *Id.* Importantly, the "burden of proof never shifts to [Orchids] nor is any onus imposed upon [Orchids] to disprove any allegation" set forth in the Amended Fifth Consolidated Complaint. *Id.* In this case, the General Counsel has not met this burden and the claims should be dismissed.

I. Legal Standard for Section 8(a)(1) Claims

Section 8(a)(1) of the Act forbids employers to "interfere with, restrain or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). Section 7, meanwhile, establishes the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. The Board's well-settled test for determining a Section 8(a)(1) is "whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *American Freightways Co.*, 124 NLRB 146, 147 (1959). Although the Board applies an objective standard, there are situations where motive and probable success or failure of the coercion may be considered. *See Keith Miller*, 334 NLRB 824, 830 (2001). The General Counsel bears the ultimate burden of proving interference, restraint, or coercion in violation of the Act.

II. Legal Standard for Section 8(a)(3) Claims

Section 8(a)(3) of the Act prohibits "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). The General Counsel bears the initial burden of proving by a preponderance of the evidence that: (1) the employees as to whom the alleged violation was committed engaged in protected conduct; (2) the employer knew of the protected conduct; (3) the employer took an adverse employment action against the employees; and (4) the protected conduct was a motivating factor in the decision to take the adverse action. *Wright* Line, 251 NLRB 1083 (1980).

The first element requires the General Counsel to prove that the employees as to whom the alleged violation was committed engaged in conduct protected by Section 7 of the Act. Section 7 of the Act guarantees employees "the right to self-organization, to form, join, or assist labor organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual

aid or protection . . .." 29 U.S.C. §157; *see also Eastex, Inc. v. NLRB*, 437 U.S. 556 (1987); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962). The Board has construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *aff'd* 835 F.2d 1481 (D.C. Cir. 1987), *cert den* 487 U.S. 1205 (1988); *see also NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984). The Board also further defined the scope of concerted activity:

> [A] conversation may constitute a concerted activity although it involves only a speaker and listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

Meyers Indus., Inc., 281 NLRB at 887 (citing *Vought Corp.*, 273 NLRB 1290, 1294 (1984), *enf'd* 788 F.2d 1378 (8th Cir. 1986) and *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964)).

In order to find that an employee has engaged in concerted activity, the Board requires that the activity "be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus., Inc.*, 281 NLRB at 885. This rule prevents personal gripes relating to job conditions and the purely individual invocation of statutory workplace rights from falling within Section 7's definition of "concerted activity." *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988). "[A]t some point an individual employee's actions may become so remotely related to the activities of fellow employees that it cannot reasonably be said that the employee is engaged in concerted activity. . . . The Board has held that if an employer were to discharge an employee for purely personal 'griping,' the employee could not claim the protection of §7." *NLRB v. City Disposal System, Inc.*, 465 U.S. 822, 833 n.10 (1984) (citing *Capitol Ornamental Concrete Specialties, Inc.*, 248 NLRB 851 (1980)). Thus, activity taken by an employee for his or her own personal benefit is not concerted activity. *Meyer Indus., Inc.*, 281 NLRB at 882; *see also Certified Serv., Inc.*, 270 NLRB

360 (1984) (holding that an employer did not violate Section 8(a)(1) of the Act when it discharged an employee who filed a complaint with OSHA as the "undisputed evidence reveals that [the employee] acted alone and on his own behalf"); *Goodyear Tire & Rubber Co.*, 269 NLRB 881 (1984) (finding that an employee's refusal to perform an assignment based on his belief that the equipment was unsafe was not protected concerted activity as none of the other employees had complained). Indeed, activity benefiting a single employee is not protected concerted activity. *See Holling Press, Inc.*, 343 NLRB 301 (2004) (overruled on other grounds).

With respect to the second *Wright Line* element, the General Counsel must prove that Orchids knew of the protected conduct. As such, "credible proof of 'knowledge' is a necessary part of the General Counsel's threshold burden, and without it, the complaint cannot survive." *The Register Guard*, 344 NLRB 1142, 1145 (2005) (quoting *Tomatek, Inc.*, 333 NLRB 1350, 1355 (2001)); *Stanford Linear Accelerator Center*, 328 NLRB 464, n.2 (1999) ("Without this knowledge, there is no basis for finding that there was a prima facie case for discriminatory conduct."); *Mack's Supermarkets, Inc.*, 288 NLRB 1082, 1101 (1988) ("Company knowledge of union activities is a 'threshold question' where a violation of Section 8(a)(3) of the Act is alleged, because it is a 'fundamental prerequisite' in establishing a discriminatory motivation.") (citation omitted).

As to the fourth element, absent direct evidence of discrimination, the General Counsel must establish a causal link between the protected activity and the adverse employment action by circumstantial evidence – *i.e.*, by showing that the employer's decision was inconsistent with its other actions, its treatment of similarly-situated employees, or its past practices, or by establishing some temporal proximity between the employment action and the protected activity. *See., e.g.*, *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Peter Vitalie Co.*, 310 NLRB 865, 871 (1993) (explaining that "[t]he classic elements commonly required to make out a *prima facie* case of union

discriminatory motivation under Section 8(a)(3) of the Act are union activity, employer knowledge, timing, and employer animus"). This nexus between the protected activity and the adverse employment action must not be attenuated, but "must rest on something more than speculation and conjecture." *Amcast Automotive of Ind., Inc.*, 348 NLRB 836, 839 (2006). *Sam's Club, a Div. of Wal-Mart Stores, Inc. v. NLRB*, 173 F.3d 233, 242-43 (4th Cir. 1999).

Moreover, "[i]t is well established that in the absence of direct evidence [of anti-union animus], animus is not lightly to be inferred." *CEC Chardon Elec.*, 302 NLRB 106, 107 (1991) (multiple citations omitted). In the absence of any proof of employer animus, it is irrelevant whether or not the employer would have taken the action in question in the absence of protected activity – the allegation must fail. *See, e.g., Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 136 (1993). "Although Respondent's reasons for its actions are not free of doubt, the Board has observed that even when the record raises 'substantial suspicions' regarding employee discharges, the General Counsel is not relieved of 'the burden of proving that Respondent acted with an illegal motive." *Yusuf Mohamed Excavation*, 283 NLRB 961, 962-64 (1987) (citing *Affiliated Hosp. Prods.*, 245 NLRB 703, n.1 (1979)); *see also CEC Chardon Elec.*, 302 NLRB at 107.

Only if the General Counsel meets its initial burden does the burden shift to the employer to rebut this showing by demonstrating a legitimate, nondiscriminatory motive for its actions. *See Upper Great Lakes Pilots, Inc.*, 311 NLRB at 136; *Wright Line*, 251 NLRB at 1089. To satisfy its burden, the employer must show "that the same action would have taken place even in the absence of the protected conduct." *See Wright Line*, 251 NLRB at 1089. It is not for the trier of fact to evaluate whether or not the business reasons asserted by the employer make sound business sense. The employer need only show that it was honestly motivated by legitimate, nondiscriminatory business reasons. *See Ryder Distribution Resources, Inc.*, 311 NLRB 814, 816-17 (1993) (citing *NLRB v. Savoy*

Laundry, 327 F.2d 370 (2d Cir. 1964), *enf'g in part* 137 NLRB 306 (1962)). The General Counsel retains the ultimate burden of proving the elements of an unfair practice by a preponderance of the evidence. *See Wright Line*, 251 NLRB at 1088 n.11.

III. Legal Standard for Section 8(a)(5) Claims

Together, Section 8(a)(5) and 8(d) of the Act make it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of [its] employees," 29 U.S.C. § 158(a)(5), "with respect to wages, hours, and other terms and conditions of employment," 29 U.S.C. § 158(d). Violations of Section 8(a)(5) may involve "unilateral changes" or "contract modification." *See Bath Iron Works Corp.*, 345 NLRB 499, 501 (2005), *aff'd sub nom. Bath Marine Draftsmen's Ass'n v. NLRB*, 475 F.3d 14 (1st Cir. 2007).

Although related, "unilateral changes" and "contract modifications" are fundamentally different. In a "unilateral change" case, the General Counsel must "show that there is an employment practice concerning a mandatory bargaining subject, and that the employer has made a significant change thereto *without bargaining*." *Id.* at 507 (emphasis in original). "The allegation is a *failure to bargain*." *Id.* (emphasis in original). Accordingly, the remedy for a "unilateral change" is to bargain. *Id.*; *see also St. Vincent Hospital*, 320 NLRB 42 (1995) ("If the employment conditions the employer seeks to change are not 'contained in' the contract . . . the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change."). Of course, "not every unilateral change . . . constitutes a breach of the bargaining obligation." *Peerless Food Prod.*, 236 NLRB 161 (1978). "The change unilaterally imposed must, initially, amount to a 'material, substantial, and a significant' one . . .." *Id.* (quoting *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327 (1976)); *see also Lindsay for & on Behalf of NLRB v. Mike-sell's Potato Chip Co.*, No. 3:17-CV-126, 2017 WL 2311295, *4 (S.D. Ohio May 26, 2017); *Pub. Serv. Co. of New Mexico v. NLRB*, 843 F.3d 999, 1007 (D.C. Cir. 2016).

Additionally, a union may waive bargaining with respect to a particular condition of employment. *See Bath Iron Works Corp.*, 345 NLRB at 501. Such a waiver is valid so long as it is clear and unmistakable. *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983). If the union fails to request bargaining, the union will have waived its right to bargain over the matter in question. *NLRB v. Okla. Fixture Co.*, 79 F.3d 1030, 1036-37 (10th Cir. 1996) (multiple quotations omitted). "A union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *Id.* (quotation omitted); *see also Am. Diamond Tool, Inc.*, 306 NLRB 570, 571-72 (1992); *The Bohemian Club*, 351 NLRB 1065, 1067 (2007); *Talbert Manufacturing, Inc.*, 264 NLRB 1051, 1055 (1982); *KGTV*, 355 NLRB 1283 (2010). In fact, in *Heartland Plymouth Court v. NLRB*, 838 F.3d 16 (D.C. Cir. 2016), the Court of Appeals awarded attorney fees to an employer as the Board argued in bad faith that its "clear and unmistakable" waiver policy should be upheld. *See id.*

By contrast, to establish a "contract modification," the General Counsel must show a contractual provision, and that the employer has modified the provision. *See Bath Iron Works Corp.*, 345 NLRB at 501. "The allegation is failure to adhere to the contract." *Id.* The remedy for a "contract modification" is therefore to require the employer to adhere to the contract. *Id.* Where the General Counsel asserts an unlawful contract modification, "the Board is limited to determining whether the employer has altered the terms of a contract without the consent of the other party." *Id.* The Board will not find a violation if "an employer has a 'sound arguable basis' for its interpretation of a contract and is not 'motivated by union animus or . . . acting in bad faith.'" *NCR Corp.*, 271 NLRB 1212, 1213 (1984) (quoting *Vickers, Inc.*, 153 NLRB 561, 570 (1965); *see also American Electric Power*, 362 NLRB No. 92, slip op. at 1-3 (May 28, 2015).

In interpreting a collective bargaining agreement to evaluate the basis of an employer's

contractual defense, the Board gives controlling weight to the parties' actual intent underlying the contractual language in question. To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, such as a past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Mining Specialists, Inc.*, 314 NLRB 268, 268-69 (1994). To determine the parties' intent, the Board examines both the contract language itself and relevant extrinsic evidence, such past practice of the parties in regard to the effectuation or implementation of the contract provision in question, or the bargaining history of the provision itself. *Id.*

IV. Claims Regarding People Source Employees

The General Counsel contends several claims based on the People Source employees. First, the General Counsel contends that Orchids violated Section 8(a)(1) and 8(a)(3) of the Act by ceasing the use of five (5) specific People Source employees who were assigned to Orchids for more than 60 days – Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt. Next, the General Counsel contends that Orchids made a unilateral change in violation of Section 8(a)(1) and 8(a)(5) of the Act by ceasing to use these People Source employees to perform non-production overtime work without submitting the change to bargaining. Finally, the General Counsel contends that Orchids made a contract modification in violation of Section 8(a)(1) and 8(a)(5) of the Act by using People Source employees for more than 60 days without applying the terms of the CBA.

Each of these claims is premised upon an assumption that these People Source employees were also employees of Orchids, and therefore covered by both the Act and the CBA. However, these People Source employees were not employees of Orchids, regardless of the length of time they worked for Orchids. As such, the People Source employees are not "employees" under the Act and are not covered by the CBA between Orchids and the Union.

Furthermore, even if they were considered Orchids' "employees" for purposes of the Act and

the CBA, Orchids did not violate Section 8(a)(1) and 8(a)(3) because (1) there is no evidence that any of Orchids' supervisory employees knew that Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, or Jennifer Whisenhunt had engaged in protected activity, and (2) there is no evidence of discriminatory animus by Orchids. Additionally, Orchids did not violate Section 8(a)(1) and 8(a)(5) of the Act as to the People Source employees because (1) Orchids did not have an obligation to bargain over a decision that had no impact on the bargaining unit, and (2) even if it did have an obligation to bargain and the People Source employees were part of Orchids' bargaining unit, it did so in good faith.

A. Orchids and People Source Were Not Joint Employers of People Source Employees within the Meaning of *Browning-Ferris Industries.*

Each of the claims pertaining to the People Source employees is premised upon the assumption that the People Source employees were also employees of Orchids. The Board's recent decision in *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (Aug. 27, 2015), currently under appeal with the United States District Court for the District of Columbia ("*BFI*"), sets forth the joint employer standard. However, this case is not the same as *BFI.*

The burden of proving joint employer status rests with the General Counsel. *See BFI*, at 18. Under the standard set forth in *BFI*, two or more entities will be considered joint employers of a single work force if (1) there is a common law employment relationship between the employees in question, and (2) the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining. *See BFI*, at 2. The Board's decision in *BFI* clarified that "all of the incidents of the relationship must be assessed." *See BFI*, at 16.

In the present case, unlike in *BFI*, the General Counsel presented virtually no evidence of Orchids possessing control over who People Source hires to work at its facility. The unrefuted testimony further established that Orchids did not impose any conditions on People Source's ability to make hire, discipline, or terminate the employment of People Source's employees. In fact, the General

Counsel did not introduce testimony about any meaningful supervision by Orchids over the performance of work by People Source employees.

By contrast, in *BRI*, the client exercised significant control over certain processes used by employees of the temporary agency. For example, the client controlled certain speed levels and actually set specific productivity standards for the employees of the temporary agency. The client regularly interacted with the temporary workers before their daily breaks, had group meetings with the clients' workers to discuss productivity issues, required drug tests of the temporary workers, and imposed requirements on how they should leave their work areas. Similarly, the terms of the Services Agreement between Orchids and People Source are much different than the terms of the agreement in *BFI*, as the Services Agreement does not provide control to Orchids with respect to hiring, firing, disciplinary decisions, processes, or wages.

Additionally, in this case, the General Counsel presented virtually no evidence that Orchids plays a significant role in determining employees' wages. People Source determines employees' pay rates, administers all payments, retains payroll records, and is solely responsible for providing and administering benefits. In contrast, the client in *BFI* explicitly prevented the temporary agency from paying their employees more than the client's employees performing comparable work and limited the pay rates for the temporary workers. In this case, the testimony shows the People Source employees were not performing comparable work, and there is no evidence that Orchids exerted any control over People Source or set any wage limitations of any kind on how much People Source pays its employees.

Another dramatic difference between the testimony in the present case and *BFI* relates to the hiring process. In *BFI*, the client's agreement with the temporary agency outlined numerous hiring standards imposed by the client, on which the Board expressly relied in making its joint employer finding. The General Counsel offered virtually no evidence of similar standards being imposed on the

People Source employees by Orchids.

There are many other distinctions between the facts in *BFI* and the testimony in the present case. For instance, in *BFI*, the clients' managers directly counseled the temporary workers for workplace performance problems. Orchids plays no role in counseling or otherwise disciplining People Source employees. In *BFI*, the client provided safety training for the temporary workers. There is no testimony that Orchids provides any such training to People Source employees. Moreover, in *BFI*, the client required the temporary workers to test its employees to determine that they meet the clients' standard employee productivity benchmarks. There is no testimony that Orchids imposed any remotely similar requirement on the People Source employees. In *BFI*, the client also required the temporary workers to sign a written acknowledgement of the clients' work rules. The testimony is clear in the present case that People Source employees are covered only by People Source's work rules, not Orchids' work rules.

As the foregoing evidence makes clear, Orchids did not exercise the same degree of control that was exercised by the putative joint employer in *BFI*. Indeed, the relationship between Orchids and People Source in the present case exemplifies "mere service under an agreement to accomplish results or to use care and skill in accomplishing results" which the Board declared in *BFI* is **not** "evidence of an employment, or joint-employment relationship."

Ignoring virtually all of the foregoing factual differences between the present case and *BFI*, the General Counsel relies heavily upon a few cherry picked emails between Orchids and People Source and the testimony of 2 of the 5 People Source employees who worked at Orchids. Even with this limited testimony and evidence, the General Counsel is not able to meet its burden of establishing that the People Source employees were employees of Orchids.

B. Because People Source Employees Were Not Employees of Orchids, They Are Not Covered Under the Act.

Under the Act, the term "employee" includes "any employee, and shall not be limited to the employees of a particular employer . . . but shall not include . . . **any individual having the status of an independent contractor**." 29 U.S.C. § 152(3) (emphasis added). "[T]he Board's interpretation of 'employee' is consistent with the common law of agency." *NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 86 (1995); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968) ("Congress passed an amendment specifically excluding 'any individual having the status of an independent contractor' from the definition of 'employee' contained in § 2(3) of the Act. The obvious purpose of this amendment was to have the Board and the courts apply general agency principles in distinguishing between employees and independent contractors under the Act."). "In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business." Rest. 2d *Agency* § 220.

Applying those factors here, People Source was an independent contractor of Orchids, and, by extension, its employees were also independent contractors of Orchids. Just as Orchids was not a joint employer of People Source employees for purposes of *BFI*, People Source employees are not employees of Orchids under the Act. Because the Act, by its terms, only grants to "employees" the

"right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, Orchids could not have violated Section 8(a)(1) or 8(a)(3) by ceasing to use those employees. The General Counsel's claims under Section 8(a)(1) and (a)(3) therefore fail as a matter of law.

C. Because the People Source Employees Were Not Employees of Orchids, They Are Not Covered Under the CBA between Orchids and the Union.

The General Counsel relies upon the fact that some of the People Source employees were assigned to the Orchids' facility on a "permanent temporary" basis – to use the term used by People Source and its employees – as evidence of an employment relationship between Orchids and the People Source employees. According to the General Counsel, Orchids allegedly violated Section 8(a)(1) and 8(a)(5) by making a "contract modification" and failing to apply the terms of the CBA once People Source employees assigned to Orchids had worked for Orchids for more than 60 days.

The General Counsel's argument disregards the parties' agreement as provided in Article 16, Section 7 of the CBA, which gives Orchids the "exclusive right to determine whom its employees shall be and from source(s) they will be chosen outside of the bargaining unit." Furthermore, the Recognition Clause in Article 4 of the CBA is clear that the Union is the "exclusive bargaining agent in respect to wages, hours, and conditions of employment for the Company's **employees** at its Pryor, Oklahoma, Converting facility . . ." Thus, the CBA recognizes and applies to **employees** of Orchids, as determined in the exclusive discretion of Orchids. As set forth in detail above, Carrie Bunnell, Rebecca Scott, John Aguilar, Brandon Glory, and Jennifer Whisenhunt were not employees of Orchids, but were only employees of People Source. Moreover, it is Orchids' exclusive right to determine who will and will not be an employee of Orchids, and therefore not a subject on which Orchids is required to engage in bargaining with the Union. *See Columbia College Chicago v.*

N.L.R.B., 847 F.3d 547, 553-54 (7th Cir. 2017) ("In sum, Columbia and PFAC bargained over their respective rights and duties, and agreed to a binding CBA. The terms of that contract gave Columbia the right to alter course credits—the subject area over which PFAC wanted to engage in effects bargaining. Further, the CBA did not indicated separate treatment of effects bargaining and decision bargaining. Therefore, Columbia was not under any further obligation to bargain with PFAC over the effects of the credit-hour reductions. The college had already satisfied its statutory bargaining duty on this issue when it negotiated and entered into the 2006 CBA.").

Similarly, the only CBA provisions that refer to the 60 day probationary period do not pertain to the People Source employees, as they are not "employees" under the CBA. Article 16, Section 5 provides that "[n]ew **employees** and those hired after a break in service shall be considered probationary employees for sixty (60) days following their date of hire. The retention or dismissal of probationary **employees** shall be in the sole judgment of the Company. An **employee** who is retained in the **employ** of the Company after the end of the probationary period shall be given continuous service credit back to the date of hire." Article 14, Section 2 provides that "In order to be entitled to pay for a particular holiday, an **employee**, in all cases, must have completed his/her probationary period of sixty (60) days." Therefore, despite General Counsel's argument, the provisions of the CBA do not encompass anyone who is not, at a minimum, an employee. As the General Counsel has not met its burden of establishing that People Source employees were jointly employed by Orchids, the People Source employees are not covered by the CBA between Orchids and the Union. Orchids did not modify these provisions of the CBA pertaining to a 60-day period for new employees because these provisions apply only to Orchids' employees, which does not include People Source employees.

D. The General Counsel Is Unable to Establish a *Prima Facie* Case of Section 8(a)(3) Discrimination Based on Orchids' Decision Not to Use People Source Employees as Temporary Workers.

The General Counsel is unable to establish a *prima facie* case of discrimination because (1)

there is no evidence that any of Orchids' supervisory employees knew that Bunnell, Scott, Aguilar, Glory, or Whisenhunt had engaged in protected activity and (2) there is no evidence of discriminatory animus by Orchids. Further, there is absolutely no evidence that Orchids knew of any protected conduct by any of the 5 listed People Source employees when it ceased using labor from People Source. In fact, Dooley testified that he did not hear about the People Source employees signing any Union cards for the Union until September 14, 2016, more than a month after Orchids stopped using them. Accordingly, the General Counsel cannot meet its initial burden to establish a *prima facie* case of discrimination. Moreover, even if the General Counsel were able to meet its burden of showing employer knowledge of protected activity, there is no evidence of any animus relating to any purported protected concerted. In fact, Orchids actually made an offer to the Union to hire these individuals as Orchids' own employees. This is not indicative of the hostility required for a *prima facie* case of discrimination under Section 8(a)(3). Absent credible evidence showing not only that the employer knew of the protected activity, but viewed it with hostility, *Tomatek, Inc.*, 333 NLRB at 1355, the General Counsel cannot establish a *prima facie* case of discrimination. The General Counsel has therefore failed to establish a claim for discrimination under Section 8(a)(1) or 8(a)(3) based on the decision of Orchids to cease using these People Source employees as temporary workers.

E. Neither the Use of People Source Employees nor the Failure to Use People Source Employees Affected Members of Orchids' Bargaining Unit.

Assuming *arguendo* that the People Source employees were somehow covered by the Act and Orchids' CBA as an Orchids employee, the General Counsel is still unable to establish a violation of Section 8(a)(1) and 8(a)(5) with respect to the People Source employees because (1) Orchids did not have an obligation to bargain over a decision that had no impact on the bargaining unit, and (2) even if it did have an obligation to bargain, it did so in good faith.

First, Orchids did not have an obligation to bargain over a decision that had no impact on the

bargaining unit, such as the use of the People Source employees. To prove a Section 8(a)(5) failure to bargain violation, the General Counsel must prove that "the employer made a material and substantial change in a term of employment without negotiating with the union." *Pan American Grain Co., Inc.*, 351 NLRB 1412, n.9 (2007); *J&J Snack Foods*, 363 NLRB 21 (2015) (holding that even if the Board would consider the company's decision to act consistently with a past practice a "unilateral change," the Board has continued to adhere to the proposition that "the duty to bargain arises only if the changes are 'material, substantial and significant.'"). It is General Counsel's burden to prove that Orchids' use of People Source employees made a material and substantial change to the bargaining unit. The decisions made by Orchids pertaining to the use of the People Source employees had no impact on the bargaining unit. "The board has long held that an employer is not obligated to bargain over changes so minimal that they lack such [a material, substantial, and significant] impact [on the bargaining unit.]" *The Toledo Blade Co.*, 343 NLRB 385, 388 (2004) (citation omitted); *see also Murphy Oil USA*, 286 NLRB 1039, 1041 (1987); *Coca Cola Bottling Works, Inc.*, 186 NLRB 1050, 1062 (1970).

In *General Electric*, 264 NLRB 56 (1982), a case where the issue was whether the company violated the Act by failing to bargain over permanently subcontracting out a portion of work previously done by a member of the bargaining unit – more extreme than the issues presented in this case – the company argued it did not violate the Act because there was little or no adverse impact on the bargaining unit. The Board dismissed the complaint in its entirety and did not find a violation of the Act as there was no demonstrable adverse impact on unit employees. *See also Professional Medical Transport*, 362 NLRB No. 19, slip op. at 13-14 (February 26, 2015) (dismissing Section 8(a)(5) claim as the employees were not adversely affected in a "material, substantial, and significant" way).

The General Counsel has not alleged or established that the use of the People Source employees by Orchids had any demonstrable negative impact on bargaining unit members. In fact, when Orchids

ceased using the People Source employees and allowed members of the bargaining unit to volunteer for overtime for this work, not a single member of the bargaining unit volunteered to do the work that had been performed by People Source employees. Thus, in order for the work to be completed, and as it was Orchids' understanding that Vincent claimed the work was covered by the CBA, Orchids had no option but to begin drafting members of the bargaining unit to perform the overtime work. Orchids did so in accordance with the terms of the CBA.

Further, even if Orchids had a duty to bargain over the effects of the use of temporary People Source workers on the bargaining unit, the claim still must be dismissed because the evidence shows that Orchids did in fact bargain with the Union on this issue in good faith. To determine whether an employer failed to bargain in good faith, the Board considers the employer's overall conduct from which "it must be decided whether the employer is lawfully engaged in hard bargaining . . . or unlawfully endeavoring to frustrate the possibility of arriving at any agreement." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (citation omitted).

Here, the evidence shows that Orchids maintained a firm position that the People Source employees were not employees of Orchids. However, the evidence shows that Orchids was otherwise open to discussing proposals with the Union. Orchids met with the Union and sent several emails on the subject, making a proposal on multiple occasions to even create a new job classification under the CBA to hire the People Source employees. Orchids expressly invited the Union, several times, to present proposals for Orchids' consideration, but did not receive any proposals or any response to its proposal to create a new classification in the CBA and hire the People Source employees. Orchids also had several communications with the Union in response to information requests made by the Union. As such, in totality, the evidence in the record demonstrates that Orchids bargained with the Union in good faith with respect to the use (or lack thereof) of People Source employees. As such, the

General Counsel cannot establish that Orchids violated Section 8(a)(1) or 8(a)(5) with the People Source employees.

V. Claims Regarding Conversion of Lines 6 And 7

The General Counsel's argument that Orchids made a contract modification in violation of Section 8(a)(1) and 8(a)(5) of the Act by converting Lines 6 and 7 to a High Performance Work System, or "Op-Tech" line, without the Union's agreement is equally without merit. As noted above, Article 37 of the CBA provides that "[a]fter the successful startup of the line, the company may entertain the idea to expand this opportunity to line 7 and/or line 6," and "[t]he understanding is both parties will discuss and must agree before expanding cell concept to existing lines." Tr. at 72; GC Ex. 2 at 29.

Although the language of the CBA is ambiguous, the Union Local President and a Union Committee Member at the time of the 2012 CBA negotiations both confirmed that it was the understanding of both parties that the conversion of Lines 6 and 7 had already been negotiated in 2012. See Tr. at 828-30. As such, Orchids' decision to move forward with a conversion that both Orchids and the Union members involved in the negotiations believed to have already been addressed in the CBA cannot constitute a "contract modification" in violation of Section 8(a)(1) and 8(a)(5) of the Act. Instead, Orchids merely engaged in a conversion that it was already permitted to make under the existing terms of the CBA. The fact that Vincent may have expressed his present disagreement with such a conversion does not change what the parties actually agreed to in 2012. As a result, the General Counsel's claim under Section 8(a)(1) and 8(a)(5) based on the conversion of lines 6 and 7 should be dismissed.

VI. Claims Regarding Changes To Health Insurance Plan

The General Counsel also argues that Orchids violated Section 8(a)(1) and 8(a)(5) by adopting a new health benefit plan. Orchids acknowledges that, as a general rule, "[p]ension and healthcare

benefits are mandatory subjects of bargaining." *Oak Harbor Freight Lines, Inc. v. NLRB*, 855 F.3d 436, 438 (D.C. Cir. 2017) (citing *Allied Chem. & Alkali Workers of Am., Local Union No. 1. v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157, 180 (1971)). Nevertheless, to constitute a violation of Section 8(a)(1) and 8(a)(5), "[t]he change unilaterally imposed must, initially, amount to 'a material, substantial, and a significant' one." *Id.* (quoting *Rust Craft Broadcasting of New York, Inc.*, 225 NLRB 327); *Lindsay for & on behalf of NLRB v. Mike-sell's Potato Chip Co.*, 2017 WL 2311295 at *4; *Pub. Serv. Co. of New Mexico*, 843 F.3d 999, 1007 (D.C. Cir. 2016) (multiple citations omitted).

As noted above, given projected across-the-board increases of 13% in the cost of its benefit plan, Orchids contacted a new broker with experience in the union environment, Lockton Services, to find a new medical plan and to "mirror or clone the most popular plan" provided by Orchids at that time. Tr. at 774. In response, Lockton provided several options, including a new plan which would result in a lower than anticipated increase in premiums, expand the network, and eliminate the need for primary care physician referrals. Tr. at 776-80; GC Exs. 18-19. As Moss testified, in only one instance did the change in the benefit plan result in any impact on any employee. In that case, involving an increase in the cost of a prescription drug, Moss contacted the carrier and made sure that the cost change was rolled back to the cost under the previous plan. Otherwise, all copays remained the same as under the previous plan, Orchids continued to pay 80% of the plan, the employees continued to pay 20%, deductibles and out of pocket maximums remained unchanged, and Orchids continued its practice of reimbursing deductibles for employees. Tr. at 775, 780, 794. Thus, based on the evidence presented by the General Counsel at trial, no employee actually experienced "material, substantial, and significant" change as a result of the new benefit plan and provider. Indeed, the whole purpose of the change was to avoid any sudden increase or alteration of benefits based on year-over-year premium

increases. Given the lack of any material, substantial, or significant impact on the employees, the "unilateral change" identified by the General Counsel was not a mandatory subject of bargaining and did not violate Section 8(a)(1) and 8(a)(5).

VII. Claims Regarding Changes to Clothing, Shoe and FRC Policies

The General Counsel also argues that Orchids violated Section 8(a)(1) and 8(a)(5) of the Act by unilaterally implementing clothing a shoe policies for all employees, including a FRC policy for its maintenance employees. Because those policies were a result of Federal requirements imposed by OSHA, Orchids had no choice but to implement such policies and the General Counsel's claims are without merit.

A. OSHA Investigation and Clothing and Shoe Policies

As an initial matter, the adoption of the new clothing and shoe policies were not a unilateral change in violation of Section 8(a)(1) and 8(a)(5). "In order to trigger a bargaining obligation, a unilateral change must be material, substantial and significant. *Critterton Hospital*, 342 NLRB 686 (2004). A change will not, however, constitute an unlawful unilateral change, when it narrowly addresses a newly arising condition encompassed by a preexisting rule. *See Goren Printing Co.*, 280 NLRB 1120 (1986) (limited fine tuning of pre-existing rules). Similarly, a unilateral change is not unlawful when that change is mandated by Federal law. *Exxon Shipping Co.*, 312 NLRB 566, 567-68 (1993); *Murphy Oil USA*, 286 NLRB 1039, 1042 (1987); *Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

As noted above, Grinnell, an OSHA Inspector, issued a Notice of Alleged Safety or Health Hazards to Orchids, including "[m]aintenance and production employees not adequately trained on Electrical safety work practices and lack proper PPE for electrical work," "NFPA 70E identification is lacking on electrical equipment," and "PPE hazard assessment are not in compliance." See Tr. at 502-06, 553-54; Jt Ex. 1. Subsequently, OSHA issued a Citation and Notification of Penalty for violations

of OSHA to Orchids, identifying as one of Orchids' violations not having a Hazard Assessment completed and certified by a third party and requiring employees to use appropriate PPE. Tr. at 508-12; Jt Ex. 2. As part of Orchids' abatement of more than $23,000 in penalties, Orchids was forced by OSHA to complete of a hazard assessment and training and rollout of PPE policies. Tr. at 515-19, 521-22. Orchids entered into an Informal Settlement Agreement requiring it to abate the citation pertaining to a Hazard Assessment and PPE by having a Hazard Assessment completed and implementing PPE requirements in accordance with the Hazard Assessment. The Informal Settlement Agreement also provides that OSHA can come back to the facility and revisit to make sure the abatements are being upheld. Tr. at 523-24, 530-32, 581; Jt Ex. 3. As part of its compliance with the Informal Settlement Agreement, Orchids drafted Clothing and Shoe policies for Employees and for Contractors, Vendors, and Visitors based on the Hazard Assessment. These policies became effective April 29, 2017, the date required for compliance by OSHA as part of the settlement agreement. Tr. at 527-29, 550; Jt Ex. 4.

Thus, by conducting the Hazard Assessment and drafting and implementing new Clothing and Shoe policies, Orchids was merely complying with OSHA mandates and the terms of an Informal Settlement Agreement required by OSHA to abate certain hazards and avoid penalties. In essence, the General Counsel seeks to hold Orchids liable for a unilateral change mandated by another Federal agency and by Orchids' Informal Settlement Agreement with that agency. Under such circumstances, Orchids' actions cannot constitute a "unilateral change" within the Board's precedents.

The General Counsel's argument that the OSHA requirements were limited to foot hazards is not persuasive, as OSHA clearly requires Hazard Assessments and PPE for eyes, face, head, and extremities. *See* 29 C.F.R. 1910.132. Nothing in the regulation or the Informal Settlement Agreement signed by Orchids limits Orchids' obligations to provide PPE to shoes or footwear, as opposed to other

forms of protective clothing. Likewise, the General Counsel offers no convincing evidence that the Hazard Assessment was improper or inaccurate, that Orchids was not obligated to implement the recommendations of that Assessment under the terms of its Informal Settlement Agreement with OSHA, or that the clothing called for in the new policies was not necessary to satisfy OSHA PPE requirements under the conditions in Orchids' facility. In sum, the General Counsel cites no convincing evidence that Orchids was free to bargain on the subject of PPE. Instead, after OSHA cited Orchids for alleged violations, Orchids had no choice but to implement the new clothing and shoe policies. Accordingly, the adoption of new Clothing and Shoes policies was not a violation of the Act.

B. Arc Flash Compliance with NFPA 70E And FRC Policy

For the same reason, the adoption of a new FRC policy by Orchids that complies with NFPA 70E was likewise effectively mandated by OSHA as part of its abatement of the safety violations identified by OSHA. Although NFPA 70E is an industry standard, not expressly incorporated by reference in any regulation adopted by OSHA, "OSHA recommends that employers consult consensus standards such as NFPA 70E-2004 to identify safety measures that can be used to comply with or supplement the requirements of OSHA's standards for preventing or protecting against arc-flash hazards." *See* November 14, 2016 Letter of Interpretation. Further, as part of its enforcement of its own regulations regarding workplace safety, including the General Duty clause, OSHA acknowledges that the failure to comply with those industry safety standards embodied in NFPA 70E-2004 can result in citations for violation of OSHA's own safety regulations, including the general duty clause. *Cf.* 29 CFR Part 1910, Subpart I, Enforcement Guidance for Personal Protective Equipment in General Industry; *see also* OSHA 3075 2002 (Revised), "Controlling Electrical Hazards" ("OSHA's electrical standards are based on the National Fire Protection Association Standards NFPA 70, National Electric Code, and NFPA 70E, Electrical Safety Requirements for Employee Workplaces").

Thus, OSHA routinely cites employers for failing to comply with arc flash prevention

standards found in NFPA 70E. Indeed, a failure to comply with NFPA 70E was one of the first alleged violations initially identified by OSHA in response to employee complaints about workplace safety. Orchids offered clear and undisputed testimony regarding the necessity for adopting the FRC policy at issue for maintenance workers in order to comply with NFPA 70E and its requirements for arc flash protective clothing. The General Counsel has failed to rebut that evidence or demonstrate that (1) NFPA 70E is inapplicable to Orchids' employees generally or maintenance employees specifically, or (2) the FRC policy adopted by Orchids is not necessary to comply with NFPA 70E and remedy the violations identified by OSHA. Again, because this policy was adopted specifically to comply with OSHA guidelines and the Informal Settlement Agreement with OSHA, and to abate ongoing violations specifically identified by OSHA, Orchids' failure to bargain about the FRC policy cannot constitute a failure to bargain on a mandatory subject of bargaining. As a result, the General Counsel has failed to show that the adoption of that policy is a violation of Section 8(a)(1) and 8(a)(5) of the Act.

VIII. Claims Regarding Discipline of Michael Besley

As the implementation of the FRC Policy in accordance with NFPA 70E was not unlawful, Orchids' discipline of Besley was not unlawful but was based on legitimate business reasons. Additionally, even were the implementation of the FRC Policy unlawful, the General Counsel still fails to establish a *prima facie* case of discrimination under Section 8(a)(3) of the Act because (1) Besley did not engage in any protected concerted activity, and (2) there is no evidence of animus relating to any purported protected concerted activity.

Rather, Besley refused, seemingly on principle, to abide by critical safety rules that had been discussed, posted, and discussed even more. Besley, as a senior member of the bargaining unit and the Union Local President, was used to doing whatever he wanted to do. Although the maintenance employees and bargaining unit members in Orchids' Mill, which was much hotter, had always worn the safe FRC attire, Besley did not want to wear the safe FRC attire as it was heavier and he did not

want to be too hot. Tr. at 656-66, 835-38. Besley's supervisors provided him with multiple opportunities to comply with the requirements of NFPA 70E, and he blatantly refused to comply with his supervisors' directives and the NFPA 70E requirements.

As an initial matter, the General Counsel is unable to meet its burden as Besley's failure to wear proper clothing that was required by law is not protected concerted activity. Besley was acting solely on his own behalf and without the authority of any other employees. His actions were for his own personal benefit, which is not for his own personal benefit and not for any activity protection by Section 7. *See Meyers Indus., Inc.*, 281 NLRB 882, 887 (1986), *aff'd* 835 F.2d 1481 (D.C. Cir. 1987), *cert denied* 487 U.S. 1205 (1988).

Furthermore, even if the General Counsel met its burden of showing employer knowledge of protected activity, there is simply no direct or circumstantial evidence of any animus relating to any purported protected concerted activity. Besley blatantly refused to wear the FR clothing despite receiving clear directions to do so. No employer can reasonably be expected to tolerate such misconduct. Darby, who was very familiar with the requirements of NFPA 70E and the failure to comply with Arc Flash requirements, and Thom, who was acutely aware of the potential for a return visit by OSHA, were very worried about the safety of employees and others. They both addressed these safety concerns in multiple employee forums where Besley was present. Besley's blatant refusal to wear safe clothing and his response to Orchids' clear directive was a major concern to both Darby and Thom, as well as others.

Upon suspending Besley for his refusal to wear proper protective clothing, conflicting stories, and disregard of his supervisors' directives, Darby concluded that Besley was improperly utilizing the computer maintenance management system, CMMS, and that his work production fell well below company expectations. Tr. at 636-53; R Ex. 6; Jt Ex. 32. Based upon the entirety of the situation,

Besley was given an Employee Warning Notice on May 23, 2017. Tr. at 634-35, 653-56; Jt Ex. 32.

Orchids had only legitimate, non-discriminatory reasons for disciplining Besley. He refused to follow safety rules and the directions of his supervisors. These are not trivial offenses. Such disregard for such simple safety rules could have had disastrous consequences. Orchids had no choice but to, at a minimum, discipline Besley and require him to act in a safe manner.

Orchids undoubtedly had valid reasons to discipline Besley, and there is no evidence that any aspect of the decision was based on animus toward Besley based on any protected activity. Orchids need only prove that it would have taken the same action in the absence of purported protected activity in the unlikely event the General Counsel is able to meet its burden to prove, by a preponderance of the evidence, that union animus was a substantial or motivating factor in its decision to discipline Besley. The General Counsel cannot meet that burden.

Here, Darby was motivated only by his need to ensure that his maintenance employees follow instructions and properly abide by safety requirements. Besley's refusal to follow his supervisor's instructions and his refusal to wear safe clothing are completely inconsistent with these basic rules. Accordingly, his discipline was an appropriate business decision. For these reasons, the General Counsel's Section 8(a)(3) claim against Orchids should be dismissed.

IX. Claims Regarding Union Activities During Working Time

The General Counsel alleges that Orchids made a mid-term modification to the CBA by prohibiting employees from engaging in any Union activities during working time and on the work floor. Article 8, Section 5 of the CBA states that "[i]t is expected that the officers and/or the shop steward will be away from their regular job assignment as little as possible. It is understood that if Union business or investigation of grievances need to be conducted during working hours, supervisory permission must be obtained in any departments affected." Articles 9 and 23 of the CBA also make it clear that employees should be at their workstations when they are on their shift. Orchids has not

modified these provision of the CBA.

The only evidence the General Counsel provides in support of this claim is flimsy at best – a few isolated statements whereby Orchids' management is either responding to complaints of harassment from other members of the bargaining unit (generally to Darla Reed or Chris Montoya) or having an employee perform his job (generally for Michael Besley). The General Counsel has not identified a single instance where any member of Orchids' management prevented an employee from conducting Union business when they had permission of a supervisor or disciplined any employee for performing authorized Union business. Rather, the record is replete with instances of Union Local Officers doing Union business during working hours. The General Counsel is unable to establish any unlawful modification of the CBA with respect to its claims regarding Union activity during working time in violation of Section 8(a)(1) or 8(a)(5).

X. Claims Regarding Other Section 8(a)(1) Alleged Violations

Finally, the General Counsel argues that, on 17 separate occasions, Orchids interfered with, restrained, or coerced employees in the exercise of rights guaranteed in Section 7 in violation of Section 8(a)(1) of the Act. The General Counsel has failed to carry its burden of proving that Orchids engaged in conduct that violates Section 8(a)(1). For example, Dooley did not make any statements that (1) People Source employees were discharged because they sought to be included in the Union, (2) applicants or employees were not considered for employment because they decided to be included in the Union, or (3) employees were prohibited from talking about the Union. See Tr. 831-33.

Likewise, although Mason, Robbins, and Lawson complained to Orchids that Reed was harassing them or trying to get people who participated in Union decertification efforts fired, Orchids did not take any adverse action against Reed. Indeed, Orchids did not even tell Reed that she could not engage in such reprehensible behavior outside of work hours. Instead, as it would for any complaint of harassment, Orchids simply investigated and informed Reed of the complaints, with a

Union representative present, and reminded her that during work hours she was not to go to other work areas to intimidate other employees. At no time did Orchids tell Reed that she could not engage in Union activities during work hours or in Orchids' facility. Tr. at 2, 732-33, 739-43, 756-60, 769-72; R Exs. 7, 8, 11, 13. With regard to Montoya, Orchids likewise received complaints from Lawson and Johnnie Mason. Orchids handled such complaints as it had handled similar complaints against Reed: it investigated them and addressed them appropriately. Tr. at 305-09, 687-89, 723-25; Jt Exs. 33-34.

Orchids also spoke with Gann about calling Orchids' managers "f---ing liars" on speaker phone after Orchids met with Cutler to discuss him being away from his line for over an hour. Tr. at 235-42, 272-73. Orchids did not take any adverse action against Gann or limit Gann's Union related activities, merely noting that he need not use profanity when talking with Orchids' management. No one told Gann or any other employee of Orchids that they were being watched. Further, the fact that Orchids asked Gann to let someone know if he was leaving his workspace to do Union work was not a limitation on Gann's freedom to exercise his rights under the Act but merely a request that he inform someone that he was leaving, consistent with the CBA, so that appropriate arrangements to complete any work during his absence could be made. Orchids did not take any adverse action against Gann for leaving his workspace. Tr. at 243-46, 272-73.

In sum, the General Counsel has failed to show that Orchids interfered with, restrained, or coerced any employees engaged in protected activity under the Act, or limited the ability of Union members or other employees to engage in protected activity under the Act. As such, the General Counsel's claims under Section 8(a)(1) should be dismissed.

PROPOSED CONCLUSIONS OF LAW REMEDY AND NOTICE

Based on the evidence presented at the hearing and the foregoing authorities and conclusions of law, Orchids urges that the General Counsel has failed to meet its burden and that this Amended Fifth Consolidated Complaint be dismissed with prejudice and that judgment be entered in its favor.

Respectfully submitted,

HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON, P.C.

Steven A. Broussard, OBA #12582
Molly A. Aspan, OBA #19752
320 South Boston Avenue, Suite 200
Tulsa, OK 74103-3706
Telephone: (918) 594-0595
Facsimile: (918) 594-0505
Email: maspan@hallestill.com

ATTORNEYS FOR RESPONDENT,
ORCHIDS PAPER PRODUCTS CO.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 31st day of July, 2017, a true and correct copy of the above and foregoing document was filed electronically and sent by email to:

William F. LeMaster, Field Attorney
Julie M. Covel, Field Attorney
Subregion 17
8600 Farley Street, Suite 100
Overland Park, KS 66212
William.lemaster@nlrb.gov
Julie.covel@nlrb.gov

Chad Vincent, International Representative
United Steelworkers of America
P.O. Box 1410
Benton, AR 72018-1410
cvincent@usw.org

Bruce Fickman, Associate General Counsel
United Steelworkers Legal Department
Five Gateway Center, Room 807
60 Boulevard of the Allies
Pittsburg, PA 15222
bfickman@usw.org

Steven R. Hickman, Attorney
Frasier Frasier & Hickman
1700 Southwest Blvd., Ste. 100
Tulsa, OK 74107-1730
frasier@tulsa.com

Molly A. Aspan

3186079.3:630825:00705